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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 732

AUGUST KLAPPROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 32-40) are reported at 166 F. 2d 273. The opinion of the district court (R. 21-25) is reported at 6 F. R. D. 450.

JURISDICTION

The judgment of the circuit court of appeals was entered January 12, 1948 (R. 41). The petition

for a writ of certiorari was filed April 10, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.

2. Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.

3. Whether a judgment of denaturalization may be entered by default without a hearing.

STATUTES AND RULES INVOLVED

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 55(b)-(2) of the Federal Rules of Civil Procedure provides in part:

> * * * If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its recent amendment, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal rep-

resentative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

STATEMENT

In May 1942, the United States commenced proceedings in the United States District Court for the District of New Jersey pursuant to Section 338 of the Naturalization Act to cancel petitioner's certificate of naturalization on the ground that he had taken a false oath of allegiance (R. 2-6). A summons was personally served on petitioner on May 13, 1942 (R. 1). When petitioner failed to make his appearance within the 60-day period fixed by the statute, *supra*, judgment by default was entered against him on July 17, 1942 (R. 7).

Four and a half years later, in January 1947, petitioner moved in the district court to vacate the judgment of denaturalization (R. 9-20). In an affidavit submitted in support of the petition, he alleged that at the time he was served with the summons on May 15, 1942, he was in ill health, and

was recuperating at the German-American Bund camp, known as Camp Nordland, and that because of his poor health and straitened financial circumstances, he was unable to obtain an attorney (R. 15). On July 7, 1942, eight days before the expiration of his time to answer or otherwise move in the denaturalization proceedings, he was arrested under an indictment returned against him and other Bund leaders in the United States District Court for the Southern District of New York charging conspiracy to violate the Selective Service Act. Petitioner alleged that at the time he was arrested, he had in his possession a letter addressed to the American Civil Liberties Union in New York requesting legal assistance, that the letter was taken from him at the time of his arrest, and that he did not know what had become of it. (R. 15-16.) He also alleged that the attorney who was appointed to defend him in the New York conspiracy case promised to look into the denaturalization proceedings, but that the attorney failed to do so (R. 16). He further alleged that from the time of his arrest in July 1942 until November 1946 he was in constant custody under the indictment and conviction on the conspiracy charge (subsequently reversed by this Court, *Keegan* v. *United States*, 325 U. S. 478), and in connection with the sedition trial in the District of Columbia; that after his release on the criminal charges, he was taken into custody for deportation and confined at Ellis Island (R. 16-17). He further stated that in July

1945, he and a number of other persons sought an injunction against possible deportation, but that such relief was denied (R. 17). (See *Citizens Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787.) He asserted that, because of these circumstances, he had been unable to defend the denaturalization proceedings, and he denied the truth of the allegations in the complaint for denaturalization (R. 18-19).

The district court denied the motion (R. 26). In its opinion, the court stated that from petitioner's own affidavit it appeared that his default was imputable to his own wilful and inexcusable neglect, but that even on the contrary assumption, Rule 60(b) of the Federal Rules of Civil Procedure rendered the court without power to open petitioner's default more than six months after entry of the judgment (R. 21-22). Treating the petition as a bill of review, the district court held that petitioner had shown no grounds for such relief, since he could point to no error on the face of the record and no new facts affecting the decree which would warrant its being set aside (R. 22-23). The district court also held that petitioner's delay in seeking relief from the judgment was imputable entirely to his wilful neglect, and that his petition should be dismissed on the ground of laches (R. 24). The court said (R. 24-25):

> * * * It is our opinion that the defendant's initiation of this action at this late date

> was not prompted by any desire to assume the duties of citizenship but by a recent realization of the serious consequences attendant upon the loss of its privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

On appeal, the order of the district court was affirmed (R. 41), one judge relying primarily on the absence of jurisdiction, although also noting the lack of equity in petitioner's application (R. 32-39), one judge relying primarily on laches (R. 39-40), and one judge dissenting (R. 40).

ARGUMENT

1. Despite his present protestations to the contrary, it is clear that petitioner's default in the denaturalization proceedings was wilful and deliberate. By his own account, at the time of his arrest on the New York conspiracy indictment, 52 days after he had been personally served with the summons, and only eight days before his time to answer expired, he had taken no steps whatsoever to secure representation in the denaturalization proceedings. As to the alleged letter which he was preparing to send to the American Civil Liberties Union at the time of his arrest, it is significant that petitioner makes no allegation that he attempted to discover what happened to that letter, or that he attempted to communicate further with that organization.

Furthermore, it is clear that petitioner has offered no valid excuse for failing to move more promptly after the entry of judgment. His incarceration on the criminal charges would not have prevented him from seeking assistance. As a matter of fact, a number of petitioner's co-defendants in the Selective Service conspiracy case were actively defending denaturalization proceedings (see *United States* v. *Kuhn*, 49 F. Supp. 407 (S. D. N. Y.), decided March 18, 1943),[1] and it seems unlikely that petitioner would have been unware of such fact. Admittedly, petitioner had counsel appointed for him in the conspiracy case, and thus knew of the practice of courts to assign counsel for indigent defendants. It is significant that he made no attempt to seek assistance of counsel from the District Court for the District of New Jersey. In addition, as noted in the concurring opinion of Judge O'Connell, petitioner was able to obtain counsel in an attempt to prevent possible deportation in 1945, while held on the sedition indictment, and was able to institute the instant proceedings after certiorari had been denied in that case. His custody was, therefore, not a barrier to obtaining legal assistance as he now asserts it to have been.

Manifestly, therefore, petitioner's default and subsequent inaction were wilful and deliberate.

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[1] Petitioner states that he began service of his sentence on the Selective Service charge in June 1943 (R. 16).

There is ample justification for the conclusion of the district court and of the majority of the court below that petitioner was guilty of laches. It seems clear that the defeat of Germany, rather than any inability to take prior action, prompted petitioner's present motion.

Assuming, therefore, that the district court had power to vacate the judgment four and a half years after its entry, petitioner's motion was properly denied for the reason that he failed to offer any legitimate excuse for not moving more promptly.[2]

2. Petitioner does not contend that the judgment was tainted by fraud or that new evidence has been discovered. He contends, in effect, that there are errors of law apparent on the face of the record which render the judgment of denaturalization void, and thus subject to be set aside at any time.

(a) He argues (Pet. 10-14, 21-24) that, since this Court has ruled that the evidence to support a judgment of denaturalization must be clear, unequivocal and unconvincing, denaturalization proceedings are so assimilated to criminal prosecutions that, as a matter of constitutional right, a defendant must be before the court when judgment

[2] Cf. Rule 60(b) of the Rules of Civil Procedure as recently amended, 329 U. S. 863, which specifies and codifies the relief available under older forms of remedy and provides that a motion for relief from a final judgment must be made within a reasonable time, and in some specified cases within one year after judgment.

is entered, and counsel must be assigned for him. Denaturalization proceedings are, however, obviously not criminal prosecutions. They are equity actions and it is manifest that Congress treated them as civil actions since it made provision for substituted service on absentee defendants. Certainly the provision for substituted service makes it clear that Congress did not intend to require that a defendant necessarily be before the court before entry of judgment.

While petitioner was not entitled to counsel as a matter of right since the action is a civil one, counsel undoubtedly would have been appointed for him, had he requested the court for such assistance. But since even in a criminal prosecution, a defendant may waive his right to counsel, the court was not required to appoint counsel for a defendant who, by failing to make an appearance or answer of any kind, indicated that he had decided not to contest the allegations of the complaint.

As to petitioner's contention that no clear and convincing evidence could have been adduced by the Government (Pet. 20-21), that, of course, is not an error of law appearing on the face of the record, and not a matter which can be determined at this time. As the Circuit Court of Appeals for the Second Circuit held in *United States* v. *Borchers*, 163 F. 2d 347, 349-350, certiorari denied, 332 U. S. 811:

> * * * As to such judgments the default of defendants who have been personally served

may well take the place of the "clear and unequivocal" evidence required had the case gone to trial. * * *

(b) Petitioner also contends that the court had no power to enter a judgment of denaturalization without hearing evidence (Pet. 19-21). This contention was made and rejected in the circuit court of appeals in the *Borchers* case, *supra*, and was urged in the petition for certiorari to this Court. Under Rule 55(b) of the Federal Rules of Civil Procedure, the necessity for a hearing is a matter within the discretion of the trial court. Testimony is normally taken only in those cases where the extent of the relief to be granted must be determined on evidence, and not from the complaint. Here, of course, the relief sought in the complaint was definite and certain—the cancellation of the certificate of naturalization—and judgment was entered for the specific relief sought by the complaint.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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